Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1999

JAMES GERALD DONAT,

Petitioner,

v.

VBB IV, INC., and the OFFICERS and DIRECTORS to wit,
WILLIAM and VIRGINIA BARRINGTON,
and JOHN BROZNY,

Respondent

On Petition For A Writ of Certiorari
To the Appellate Court of Illinois
For the First Judicial District, Fourth Division

PETITION FOR A WRIT OF CERTIORARI

JAMES GERALD DONAT
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Petitioner, Pro Se

39 pp

QUESTION PRESENTED

May a State court judge abuse her judicial discretion by openly defying existing Illinois laws and statutes, and in direct violation of "due process clauses" of both the Fifth and Fourteenth Amendments, confiscate, without a proper hearing, petitioner's absolute right to a day in court?

LISTING OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the Appellate Court of Illinois for the First Judicial District were:

Plaintiff/Respondent:

James Gerald Donat

Defendant/Appellant:

John Brozny

RULE 29.6 STATEMENT

James Gerald Donat is the successor in interest to VBB IV, Inc., an Illinois corporation having transferred all of its right, title and interest, to James Gerald Donat, and individual, not a corporation. VBB IV, Inc. became a de facto corporation upon dissolution on August 1, 1996. The Defendant, John Brozny, is an individual, not a corporation, who guaranteed the credit of 4 Glendale J's, Inc., an Illinois corporation, which he totally owned. 4 Glendale J's, Inc. became a de facto corporation upon dissolution on November 1, 1996.

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PETITION FOR A WRIT OF CERTIORARI

James Gerald Donat respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois for the First Judicial District, Fourth Division, in this case.

OPINIONS BELOW

The opinion of the trial court respecting the dismissal of this case with prejudice was delivered orally. The opinion of the Appellate Court of Illinois, First Judicial District, Fourth Division, on Case No. 1-98-3001, was not published and is recited in the Appendix.

JURISDICTION

The decision of the Appellate Court of Illinois, First Judicial District, Fourth Division was entered on June 30, 1999. A timely Petition to Reconsider to the Appellate Court was denied on August 3, 1999. And a timely Petition for Leave to Appeal to the Supreme Court of Illinois was denied on December 1, 1999, with a mandate issued to the Appellate Court on December 23, 1999. The jurisdiction of this court is invoked under 28 U.S.C. §1257(a), "drawn in question on the ground of its being repugnant to the Constitution... or where any title, right, privilege, or immunity is specially set up or claimed by the Constitution....

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 5, ratified December 15, 1791:

"No person shall be...deprived of life, liberty, or property, without due process of law...."

U.S. Const. Amend. 14, ratified July 9, 1868:

"Section 1."...nor shall any State deprive any person of life, liberty, or property, without due process of law;...."

28 U.S.C. §1257(a):

"...drawn in question on the ground of its being repugnant to the Constitution..., or where any title, right, privilege, or immunity is specially set up or claimed by the Constitution."

Illinois - Code of Civil Procedure - 735 ILCS 5/2-619 (West 1996):

"§ 2-619. Involuntary dismissal based upon certain defects or defenses. (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit.... (c) If, upon hearing the motion, the opposite party presents affidavits or other proof denying the facts alleged or

establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time...."

Illinois - Business Corporation Act of 1983 - 805 ILCS §5/12.30.b (West 1996):

"Survival of remedy after dissolution. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a judgment of by a circuit court of this State, or (3) by expiration of its period of duration, shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name."

Illinois - Civil Practice Law - CCP §2-1005(c):

"Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount damages."

NATURE OF THE CASE

This Petition involves the recovery of a substantial debt owed to Petitioner by Respondent Brozny. Petitioner was an investor and secured creditor in a certain restaurant owned by an Illinois corporation in good standing. On October 28th 1994, the restaurant was sold to another Illinois corporation in good standing owned by Respondent Brozny, for cash, and a promissory note from the buying corporation that was secured by a personal guarantee from Respondent Brozny. On December 31st 1994, a power of direction was also issued, by the selling corporation to the buying corporation, directing the buying corporation to pay Petitioner a certain amount monthly for 36 months. The corporation owned by the Respondent Brozny made, in January 1995, one scheduled payment and ceased to make any further payments. On August 1, 1996, the original selling corporation failed to pay a statutory fee, making it a de facto corporation upon dissolution. Later in August 1996, Petitioner filed suit against the selling corporation for non-payment. On September 4th 1997, and agreed order was made in a judge in the Circuit Court, Municipal Division, releasing the selling corporation from the suit in exchange for the right, title and interest of both the corporate note of the buying corporation, and the personal guarantee to Petitioner, thus making the above stated Respondent Brozny a party to the suit. On

April 8th 1998, the Circuit Court, Law Division, dismissed Petitioner's suit with prejudice, based on Respondent Brozny's false contention that the assignment document had no standing because it was transferred by a dissolved corporation, and because a particular transfer document did not appear in Petitioner's third amended complaint, although it existed at three other places in the pleadings (Exhibit B in the Petitioner's memorandum in support of summary judgement, filed November 14, 1997; as Exhibit B in Petitioner's response to Respondent's section 2-619 motion to dismiss third amended complaint, filed February 9, 1998; as Exhibit C in Respondent's motion to reconsider, filed May 7, 1998; and hereto appearing in Appendix, p 14a), On July 13th 1998, the same Circuit Court, Law Division, denied Petitioner's post-judgement motion to reconsider.

On June 30th 1999, the Appeals Court affirmed the lower Court decision based on the non-appearance of the assignment document in the third amended complaint (in spite of its existence at three other locations in the pleadings), and chose not to rule on the matter of whether a dissolved corporation of one year could transfer assets (in Illinois statute permits five years for such transfers, see 805 ILCS §5/12.30.b).

STATEMENT OF FACTS

The Petitioner was an investor and secured creditor in a certain restaurant owned by VBB IV, Inc., an Illinois corporation in good standing (see third amended complaint, September 19th 1997, Exhibits A and B). VBB IV, Inc. was a closely held corporation composed of two people, William

and Virginia Barrington, who were also the board of directors, officers, and sole shareholders. On October 28th 1994, the restaurant was sold to another Illinois corporation in good standing, 4 Glendale Js, Inc., a corporation owned by Respondent Brozny, for $20,000 cash, and a promissory note from the corporation for $50,000 that was secured by a personal guarantee from Respondent Brozny (see third amended complaint, September 19th 1997, Exhibits C and D, and Appendix pp 8a-11a). On December 31st 1994, a power of direction was also issued as part of the purchase agreement by the selling corporation, and signed by both Barrington's as the board of directors, directing the buying corporation to pay Petitioner $1223 per month for 36 months (see answer to Respondent Brozny's response to Petitioner's motion to reconsider, June 29th 1998, Exhibits A and B). The corporation owned by the Respondent Brozny acknowledged the debt by making, in January 1995, one scheduled payment of $1223 to Petitioner, and thereafter ceased to make any further payments (see motion to reconsider, May 7th 1998, Exhibits D and E). On August 1st 1996, VBB IV, Inc., failed to pay a statutory fee, thus making it a dissolved corporation. Later in August 1996, Petitioner filed suit against the VBB IV, Inc. for non-payment. On September 4th 1997, an agreed order was issued in the Circuit Court, Municipal Division, attesting to a settlement between Petitioner and the licensed attorney representing VBB IV, Inc. resulting in the assignment of both the corporate note and the personal guarantee to Petitioner, signed by Virginia Barrington who was an officer, shareholder, and on the board of directors of this closely held corporation, thus making the Respondent Brozny the remaining party to the suit (see motion to reconsider, May 7th 1998, Exhibits B and C).

ARGUMENT

On September 4th 1997, an agreed order was issued by a Circuit Court judge, releasing VBB IV, Inc. and the Barringtons from the suit in exchange for the assignment of the right, title, and interest of a certain corporate purchase promissory and personal guarantee signed by Respondent Brozny, thus leaving Respondent Brozny as the sole defendant in the suit. (See reference to this agreement in Appellant Court order, in Appendix, p 2a, fn 1.) On the same day of September 4th 1997, Respondent Brozny also filed his appearance and made a jury demand for twelve jurors, thus acknowledging the factual merit of the Petitioner's complaint. Then on September 11th 1997, Respondent Brozny, ignored both the judge's agreed order of September 4th 1997, and his jury demand for twelve jurors, of the same date, and without leave of court, filed a motion to strike and dismiss the action in the Municipal Division of the Circuit Court of Cook County, which was not heard there because Respondent Brozny had the case transferred to Law Division on September 26th 1997. On November 6th 1997 he filed a section 2-619 motion to strike and dismiss Petitioner's amended complaint, and on December 18th 1997 a section 2-619 motion to dismiss Petitioner's third amended complaint, with Petitioner answering each of these motions before they were finally ruled on. Respondent Brozny's original motion to strike and dismiss did not call for dismissal with prejudice, but his section 2-619 motion to dismiss asked for a prejudice ruling in the addendum on remedy. 735 ILCS 5/2-619, on which this later motion is based, only calls for the dismissal of the case under certain circumstances and does not allow for dismissal with prejudice.

Respondent Brozny's section 2-619 motion was based on the contention that the assignment of the guarantee was without standing because VBB IV, Inc. had been a dissolved corporation for one year at the time, a contention that is clearly false under the terms of Illinois law (see 805 ILCS §5/12.30.b) which grants a five year status of corporate activity after dissolution; and because the assignment had not been authorized by the board of directors of the corporation, even though the transfer was signed by an officer, director and majority shareholder of said corporation; and because the assignment of Respondent Brozny's personal guarantee to Petitioner did not exist because it did not appear in the third amended complaint (see reply to response to respondent's section 2-619 motion to dismiss third amended complaint, June 26th 1998, and Appendix p 14a), which is irrelevant according to Illinois statute (see CCP §2-1005(c)) because said document existed elsewhere in the pleadings, which clearly made it an issue of fact and not of law, thus negating the possibility of the case being a candidate for dismissal with prejudice. Nevertheless, on April 8th 1998, the Circuit Court, Law Division, judge exceeded the statutory authority given to her under the terms of a section 2-619 motion to dismiss the Petitioner's case (see 735 ILCS 5/2-619), and granted the Respondent Brozny's requested remedy of total dismissal with prejudice. In short, the judge abused her judicial discretion by granting summary judgement in disregard of existing statutes. And further abused her discretion by overriding the agreed order of a fellow Circuit Court judge issued on September 4th 1997 acknowledging the transfer corporate documents to Petitioner (a privilege only allowed to a judge on a appeals court or higher level), and by ignoring the Respondent's jury demand of the same date. Petitioner's suit was therefore improperly dismissed with prejudice, and in so doing granted forgiveness to Respondent

Brozny of his substantial $80,000 debt (principal and interest), without a trial.

On July 13th 1998, the same Circuit Court judge denied the Petitioner's post-judgment motion to reconsider. On June 30, 1999, the Appellate Court refused to rule on the matter of the transfer of a document by a dissolved corporation, choosing instead to confirm the lower court decision that a case could be dismissed with prejudice if a crucial piece of evidence were not in the third amended complaint (see Appendix, Appellate Court order of June 30th 1999, pp 1a-6a), even though said document existed at three other locations in the pleadings (Exhibit B in the Petitioner's memorandum in support of summary judgement, filed November 14th 1997; Exhibit B in Petitioner's response to defendant's section 2-619 motion to dismiss third amended complaint, filed February 9th 1998; as Exhibit C in Petitioner's motion to reconsider, filed May 7th 1998, and hereto appearing in Appendix, p 14a), as was clearly pointed out in the Petitioner's petition for rehearing, and in the subsequent Appellate Court documents.

SUBSTANTIAL FEDERAL QUESTION

May a State court judge defy statutory authority and confiscate a litigant's property right, without trial, in direct violation of the "due process clauses" of Amendments 5 and 14 of the Constitution? In other words, may any State abuse its judicial discretion and seize a litigant's right to a fair hearing in court?

"The fair hearing essential to meet minimal requirements of due process includes not only rudimentary fairness in conduct of hearing when and where held, but also reasonable fair opportunity to be present at time and place fixed to cross-examine any opposing witnesses, to offer evidence, and to be heard at least briefly in defense." *Jeffries v. Olsen*, D.C. Cal 1954, 121 Fsupp 163.

"A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step to be taken. *Boston and M.R.R. v. U.S., D.C. Mass.*, 1962, 208 Fsupp 661.

Dismissing a case with prejudice, in effect denies a litigant his right to a full hearing with due process. If Illinois statute demands that a judge, when issuing an order of dismissal with prejudice (summary judgment) require affidavits stating that there is no issue of material fact, and/or review all of the pleadings of the case before determining that the issue is strictly a matter of law, must she conform to these rules before dismissing a litigant's Federally guaranteed right to a "due process" trial? Rule CCP §2-1005 (c) mandates that the trier of fact review the totality of the "pleadings, depositions, and admissions on file, together with the affidavits", in rendering his or her decision. In other words, if an allegedly missing material document does not appear in the original complaints, but is clearly present in subsequent pleadings, it in fact exists. Is the judge bound to obey the court rules and review those subsequent pleadings before usurping the litigant's right to "due process"? (See *Sanchez v. Firestone Tire & Rubber Co.*, 237 Ill.App.3d 872, 604 N.E.2d 948, 178 Ill.Dec. 425 (3d Dist. 1992, for a example of a case when a critical piece of evidence was indeed missing.)

REASONS FOR GRANTING THE WRIT

No judge, on any level, has the authority to revoke a litigant's "due process" right to a trial unless specifically authorized by statute, and then only after a full evidentiary hearing. If judges do not obey the mandate of court rules, they fail in their duty as servants of the law and upholders of fairness to the litigants appearing before them. If arbitrary and rogue rulings are allowed to stand, then they become, in principle, a tolerated judicial practise in the United States.

Judges are not despots. They are supposed to be servants of the people and absolutely bound by laws and rules. To behave otherwise is an abuse of judicial discretion. In our case obvious facts and statutes were ignored. A dissolved or de facto corporation absolutely has the right to transfer assets (see 805 ILCS §5/12.30.b). Statute further allows for a transfer document to appear anywhere in the pleadings (see Rule CCP §2-1005 (c)), and only when the transfer document is shown not to exist at all, could this case be dismissed with prejudice (see *Sanchez v. Firestone Tire & Rubber Co.*, 237 Ill.App.3d 872, 604 N.E.2d 948, 178 Ill.Dec. 425 3d Dist. 1992). In the interest of justice, no judge can confiscate a litigant's right to trial, in utter disregard for the law.

In our facts, Respondent's corporation bought a restaurant with a down payment in cash and a corporate note, secured by a signed a personal guarantee--should the corporation default in its payments. Respondent's corporation defaulted on the debt and his personal guarantee for the debt was transferred, by the selling corporation, to the Petitioner to satisfy its own personal debt to him, who subsequently sued

the Respondent personally to collect. Courts are established to right the wrongs of one party to another. Every party with a just case has a right absolute to his or her day in court, as guaranteed by the "due process" clauses of Amendments 5 and 14 of the Constitution of the United States. When courts do not honor this right, justice is thwarted by those who usurp it.

The judge, in this case, ignored a jury demand, overrode the agreed order of a fellow judge transferring the note and guaranty in question, and refused to accept that an assignment document could exist anywhere but in the Petitioner's third amended complaint, thus violating Rule CCP §2-1005(c) and dishonoring Petitioner's right to a due process hearing by dismissing the case with prejudice, and in so doing, erasing an $80,000 debt (principal and interest) without a trial on the merits. The purpose of Rule CCP §2-1005(c) is to protect litigants by imposing a strict set of constraints on judges, so that no judge may exceed his authority and dismiss a case with prejudice, without just cause and a factual hearing. This constraint on a judge's power is reasonable and fair, and is intended to insure that no litigant is improperly denied their right to a trial de novo.

When evidence to support a plaintiff's case exists anywhere in the filed pleadings, justice demands that an evidentiary hearing be held. In this case the judge, acting for the State, refused to hold such a evidentiary hearing, resulting in the forfeiture of Petitioner's right to collect a debt based on the merits of a trial, and improperly dismissing Respondent's substantial obligation. Such a wrong is an abuse of discretion must be redressed.

CONCLUSION

Courts must be governed by a uniform set of laws and statutes. Judges, as servants of the people, are sworn to uphold these same laws and statutes. Any judge who abuses his or her discretionary authority effectively destroys them. To allow any state or judge to violate this rule of law destroys the public confidence that justice can be attained in any court of this land.

The "due process" clauses of the 5th and 14th Amendments to the Constitution were specifically enacted to protect a litigant's individual rights against such abuses of judicial discretion. The facts of this case clearly demonstrate a violation of said rights through judicial abuse.

Due process mandates the right of every individual litigant to a day in court. Wherefore, for the foregoing reasons, Petitioner James Gerald Donat prays this Honorable Court grant his writ of certiorari.

Respectfully submitted,
James Gerald Donat

Petitioner, Pro Se

No. 1-98`3001

IN THE APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT, FOURTH DIVISION

JAMES GERALD DONAT Plaintiff-Appellant, v. VBB IV, Inc., and the Officers and Directors to wit, WILLIAM and VIRGINIA BARRINGTON, and JOHN BROZNY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 96 M1 146459 Honorable Loretta C. Douglas

ORDER

Plaintiff James Gerald Donat appeals pro se from the dismissal with prejudice of his third amended complaint for lack of standing. Plaintiff contends that the trial court erred in ruling that a dissolved corporation could not assign an asset to him.

On August 19, 1996, plaintiff filed a pro se complaint, seeking $25,000 from defendants VBB IV, Inc. (VBB) and William and Virginia Barrington (the Barringtons), the officers, directors, and sole shareholders of the VBB. In his complaint, plaintiff alleged that, in 1993, he invested $25,000 in a Chicago restaurant owned by VBB. Plaintiff alleged that he was to be repaid prior to shareholder distribution and that he had a security interest in the restaurant equipment.

Plaintiff further alleged that the restaurant was sold to James Brozny (Brozny) for $60,000, that none of this sum had been paid to plaintiff, and that the Barringtons had taken the money. Attached as exhibits to the complaint were a copy of a cashier's check for $25,000 payable to VBB, a receipt for $25,000 acknowledging plaintiff's purchase, signed by Virginia Barrington on February 26, 1993, and a recorded lien for the restaurant equipment.

On January 14, 1997, plaintiff filed a first amended complaint in which he additionally alleged that Virginia Barrington stated under oath at a creditor's hearing in her personal bankruptcy that VBB had no assets and that the restaurant belonged to the investors. Plaintiff further alleged that Virginia Barrington had embezzled the funds from the sale to Brozny and, therefore, breached her fiduciary duty to the corporation, providing grounds for piercing the corporate veil.

On August 12, 1997, plaintiff filed an "Amended Complaint" (now considered plaintiff's second amended complaint), which did not contain any of his previously filed allegations against VBB or the Barringtons[1]. The second amended complaint named Brozny as the only defendant and sought to recover $50,000 from him personally. Plaintiff alleged that Brozny entered into an agreement for the sale of the restaurant in October 1994, and that, as part of the purchase price, he executed a personal note to VBB for $50,000. Plaintiff further alleged that VBB had transferred

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[1] Both VBB and Virginia Barrington were dismissed by agreement of the parties by an order dated September 4, 1994 [sic]. While this order does not mention William Barrington, the second and third amended complaints contain no allegations against him.

the unpaid not to him. In addition to the previously filed exhibits, attached to the complaint was a "purchase promissory note" dated October 18, 1989, which stated that 4 Glendale J's, Inc., (Glendale J's) promised to pay to VBB $50,000. The note was signed by Brozny in his capacity as president of Glendale J's.

On November 20, 1997, the trial court struck plaintiff's second amended complaint on Brozny's motion and granted leave to file his third amended complaint *nun pro tunc* to September 19, 1997. The motion to dismiss is not included in the record of appeal.

Plaintiff's third amended complaint alleged that, "on or about October 28, 1994, a corporation controlled by John Brozny" entered into a purchase agreement for the restaurant. It further alleged that, as part of the purchase price, Brozny, in his corporate capacity, executed a note in the amount of $50,000 and executed a personal guarantee on that note. Finally, the third amended complaint alleged that VBB had transferred to plaintiff the unpaid note, executed in his corporate capacity, and Brozny's personal guaranty. Plaintiff attached a copy of the purchase agreement for the restaurant, dated October 28, 1994, listing VBB as the seller and Glendale J's and Brozny individually as buyers. Plaintiff also attached to the third amended complaint a copy of the "purchase promissory note," executed by Brozny as president of Glendale J's and made payable to VBB. The promissory note, in the amount of $50,000, is dated October 28, 1989. Also attached to the third amended complaint were copies of Brozny's personal guaranty, dated October 28, 1994, and VBB's assignment to plaintiff, dated August 30, 1997.

The assignment to plaintiff states in pertinent part:

"VBB IV hereby agrees, for and in consideration of

> One Hundred Dollars ($100.00) in hand paid, and other valuable consideration, to sell, transfer and assign to (plaintiff), all of its right, title and interest in a certain Purchase Promissory Note between John Brozny as maker and VBB IV as payee, relative to a written contract dated October 28, 1994, to purchase a certain restaurant".

On December 18, 1997, Brozny filed a motion to dismiss plaintiff's third amended complaint pursuant to section 2-619 of the Code of Civil Procedure (736 ILCS 5/2-619 (West 1996). Brozny maintained that the plaintiff had no standing to allege a cause of action based upon the assignment of the note attached to third amended complaint. Brozny argued that "(t)he purported assignment attached to Plaintiff's complaint as Exhibit "F" is void and of no force and effect". He further argued that, as a consequence, plaintiff had no standing to assert a cause of action against him based on the assignment for two reasons. First, he argued that the assignment was void because VBB had been involuntarily dissolved approximately one month prior to the date that it purportedly executed the assignment. Second, Brozny noted that the promissory note attached to the third amended complaint was executed by Glendale J's, through Brozny as its president, while the assignment attached to the third amended complaint purported to assign to plaintiff a noted executed by Brozny personally. Attached to Brozny's motion to dismiss was a certification by the Illinois Secretary of State's office that VBB had been dissolved on August 1, 1996, for failure to file an annual report and/or failure to pay franchise taxes. Plaintiff's response to this motion is not included on the record on appeal.

After a hearing on April 8, 1998, the trial court found that plaintiff had no standing but did not specify the basis for its

finding. The court granted Brozny's motion to dismiss plaintiff's third amended complaint with prejudice and denied plaintiff's subsequent motion for reconsideration. There is no transcript of the hearing contained in the record on appeal.

Plaintiff contends that the trial court erred in ruling that VBB could not transfer Brozny's personal guaranty to him after its dissolution. Plaintiff's argument is based on section 12.30 (b) of the Business Corporation Act of 1983 (805 ILCS 5/12.30 (West 1996), which provides that: "After dissolution, a corporation may transfer good and merchantable title to its assets as authorized by its board of directors or in accordance with its by-laws." Plaintiff argues that the assignment was authorized by Virginia Barrington, as officer, director, and shareholder. We find no need to address this contention, as we affirm the trial court's dismissal on other grounds. *Pryweller v. Cohen*, 282 Ill. App. 3d 899, 907 (1996) (reviewing court can based [sic] its affirmance of dismissal on any ground in the record).

In urging affirmance on appeal, Brozny contends that the exhibits attached to plaintiff's third amended complaint are inconsistent with and do not provide support for the allegations contained therein. In particular, Brozny notes that VBB's assignment to plaintiff transferred a "Purchase Promissory Note between John Brozny as maker and VBB, IV, as payee," but that such a document was never produced.

Section 2-606 of the Civil Practice Law provides that when a complaint is founded on a written instrument, the attached written instrument constitutes a part of the pleading. 735 ILCS 5/2-606 (West 1966). A motion to dismiss does not admit as true allegations in a complaint which conflict with facts disclosed in the exhibits. *McCormick v. McCormick*,

118 Ill. App. 3d 455, 460 (1983). Where a discrepancy exists between the allegations in the complaint and the substance of the exhibit, the exhibit controls. *McCormick v. McCormick*, 118 Ill. App. 3d 455, 460 (1983). "The primary basis for a 2-619 motion to dismiss is to alert the court to affirmative matter that defeats the claim or operates to avoid its legal effect." *Sarno v. Akkeron*, 292 Ill. App. 3d 80, 84 (1997).

In his third amended complaint, plaintiff alleged that Brozny had executed a promissory note, in his corporate capacity, and then executed a personal guaranty of the note. He further alleged that VBB had assigned to him both the promissory note and the personal guaranty. The assignment attached to the third amended complaint, however, reveals that VBB had assigned to him both the promissory note and the personal guaranty. The assignment attached to the third amended complaint, however, reveals that VBB actually assigned to the plaintiff a "Purchase Promissory Note between John Brozny as maker and VBB IV as payee". The purchase promissory note which is attached to the complaint, however, identifies the "maker" as Glendale J's, not Brozny. Furthermore, the attached assignment makes no mention of Brozny's personal guaranty, which plaintiff had alleged VBB also transferred to him. The assignment, upon which plaintiff based his right to recover, did not reference any document attached to his complaint. Since we affirm the trial court on this ground, we need not consider further plaintiff's argument that a dissolved corporation may sell an asset.

Accordingly, we affirm the trial court's order dismissing plaintiff's third amended complaint.

Judgment affirmed.

HOFFMAN, J., WITH SOUTH, P.J., AND WOLFSON, J., concurring.

Filed: 6/30/99.

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 1, 1999

Mr. James Gerald Donat
P.O. Box 268529
Chicago, IL 60626-8529

No. 88189 – James Gerald Donat, petitioner, v. VBB IV, Inc., etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 23, 1999.

PURCHASE PROMISSORY NOTE

$50,000 Chicago, Illinois, October 28, 1989 [sic]

FOR VALUE RECEIVED, the undersigned, 4 Glendale J's, Inc., an Illinois corporation (hereinafter "Maker") promises to pay VBB IV, Inc., and Illinois corporation, the principal sum of Fifty Thousand ($50,000.00) Dollars and interest commencing January 1, 1995, on the balance of principal from time to time unpaid at the rate of ten (10%) per cent per annum payable in instalments (including principal and interest) as follows: One Thousand Six Hundred Thirteen Dollars and Thirty-Six Cents ($1,613.36) or more on the 1st day of January 1995, and One Thousand Six Hundred Thirteen Dollars and Thirty-Six Cents ($1,613.36) or more on the 1st day of each consecutive month thereafter until this note is fully paid except that the final payment of principal and interest, if not sooner paid, shall be due on the 1st day of December 1997. All such payments on account of indebtedness evidenced by this note shall be first applied to interest on the unpaid principal balance and the remainder principal.

The principal of each of said instalments unless paid when due shall bear interest after maturity at the rate of thirteen (13%) per cent per annum. All payments are to be made at such banking house or trust company in Chicago, Illinois, as the legal holder of this note may, from time to time, in writing appoint, and in the absence of such appointment, than at the office of VBB IV, Inc., c/o William Barrington, 287 Donlea, Barrington, Illinois 60610.

Maker shall have the right, but not the obligation to prepay this Note, in whole or in part, at any time, without premium or penalty.

In the event that Maker defaults in the payment of any and all sums due hereunder and such remains unpaid for a period of five (5) days after the due date herein, the entire principal balance due hereunder shall, at holder's election and without further notice, become immediately due and payable and interest shall accrue on the unpaid and accelerated principal balance at the default rate of 13% per annum.

The payment of this note is secured by a Security Agreement of even date herewith to VBB IV, Inc. in certain equipment and trade fixtures belonging to the Maker.

All parties hereto severally waive presentment for payment, notice of dishonor, protest and notice of protest.

MAKER: 4 Glendale J's, Inc.

By: John R Brozny [signature]
President

GUARANTY

In consideration of the execution by VBB IV, Inc., an Illinois corporation, (hereinafter referred to as "Seller") of that certain Purchase Agreement with 4 Glendale J's, Inc., and Illinois corporation (hereinafter referred to as "Buyer") and of even date herewith, and in further consideration of Seller's acceptance of Buyer's Purchase Promissory Note as made and provided for under the terms of said Purchase Agreement, the undersigned (hereinafter called the "Guarantor") hereby guarantees as to the Seller, its successors and assigns, the prompt payment by Buyer of all sums due Seller, its successors and assigns, that if default shall at any time be made by the Buyer, its successors and assigns, in the prompt payment of any such sums due and owing and payable by the Maker pursuant to the terms of the Purchase Promissory Note, the Guarantor will forthwith, unconditionally and faithfully pay to Seller all such sums due thereunder in consequence of any such default by the Buyer, its successors and assigns, including, without limitation, all reasonable attorney's fees incurred by the Seller or caused by any such default and by the enforcement of this Guaranty.

This Guaranty is an absolute, continuing and unconditional Guaranty of payment and of performance of suretyship. It shall be enforceable against the Guarantor, his successors and personal representatives without the necessity for any suit or proceedings on the Seller's part of any kind or nature whatsoever against the Buyer, its successors and assigns, and without any notice of non-payment or non-observance or any other notice or demand to which the Guarantor might otherwise be entitled, all of which the Guarantor hereby waives, other than demand for payment in writing which, once made, shall be binding on Guarantor; and the Guarantor hereby expressly agrees that except as otherwise provided at

law or in equity, the validity of this Guaranty and the obligations of the Guarantor hereunder shall in no way be terminated, affected or impaired by reason of the assertion or the failure to assert by the Seller against the Buyer of any of the rights and remedies reserved to the Seller pursuant to the provisions of the Purchase Promissory Note.

The Guaranty shall be a continuing Guaranty, and the liability of the Guarantor hereunder shall in no way be affected, modified or diminished by reason of any assignment, renewal, modification or extension of the Promissory Note or by reason of any modification or waiver or change in any of the terms and conditions or provisions thereof, or by reason of any dealings or transactions or matter or things occurring between the Seller and the Buyer, their successors and assigns, whether or not notice thereof is given to the Guarantor. This Guaranty cannot be assigned, transferred, modified, changed, altered or terminated in any manner whatsoever without the express written consent of the Seller.

Dated: October 28, 1994

GUARANTOR:

John R Brozny [signature]
John Brozny

AGREEMENT

THIS Agreement is made by and between VBB IV, INC., an Illinois corporation (hereinafter "VBB IV"), and JAMES GERALD DONAT (hereinafter "Donat").

VBB IV hereby agrees, for and in consideration of the amount of One Hundred Dollars ($100.00) in hand paid, and other valuable consideration, to sell, transfer and assign to Donat, all of its right, title and interest in a certain Purchase Promissory Note between John Brozny as maker and VBB IV as payee, relative to a written contract dated October 28, 1994, to purchase a certain restaurant located at 233 East Wacker Drive, Chicago, Illinois, between John Brozny as purchaser and VBB IV as seller. With said transfer, VBB IV agrees to relinquish any and all rights it may possess in the ownership of the remaining balance due under said Promissory Note to Donat.

As further consideration for the transfer of said Note, Donat hereby agrees to dismiss with prejudice from a certain lawsuit in the Circuit Court of Cook County, Illinois, titled James Gerald Donat v. VBB IV, INC., et al., case no 96 M1-146459, and to forever release from any and all claims relative to said lawsuit, the following parties: VBB IV, INC., an Illinois corporation, and the Officers and Directors to wit, William and Virginia Barrington.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, personal representatives and assigns.

IN WITNESS WHEREOF, this Agreement has been duly executed as of the 30th day of August, 1997.

VBB IV, INC., an Illinois corporation,

By: Virginia K. Barrington [signature]
Virginia Barrington, Vice-Pres.

James Gerald Donat [signature]
JAMES GERALD DONAT

ASSIGNMENT

THIS Assignment is made pursuant to the prior Agreement between VBB IV, Inc., and Illinois corporation, and James Gerald Donat relative to the sale, transfer and assignment of a certain Purchase Promissory Note with 4 Glendale J's, Inc., an Illinois Corporation, as maker, and VBB IV, Inc., as payee.

For valuable consideration previously received, VBB IV, Inc., hereby transfers and assigns to James Gerald Donat all of its right, title, and interest in a certain written Guaranty dated October 28, 1994, made by John Brozny, as guarantor, to VBB IV, Inc., relative to the aforementioned Promissory Note.

This Assignment is executed this 24th day of September, 1997.

ASSIGNOR:

VBB IV, INC., an Illinois corporation,

By: Virginia Barrington [Signature]
Virginia Barrington, Vice-Pres.

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Verified complaint filed, August 19th 1996.

Summons served, August 29th 1996.

Case set on default call, September 17th 1996.

Motion of defendant to file appearance and jury demand allowed, October 1st 1996.

Case set for trial call, October 1st 1996.

Defendant's appearance filed, October 9th 1996.

Order on vacate default allowed, date set for prove up, October 12th 1996.

Plaintiff's motion for the imposition of interest due to vexatious delay in payment filed, October 13th 1996.

Defendant's motion spindled, December 12th 1996.
Plaintiff's notice to produce filed, January 14th 1997.

Answer of defendant VBB IV, Inc., to plaintiff's complaint, April 24th 1996.

Plaintiff's motion for sanction and default judgement filed, May 14th 1997.

Second Amended complaint filed, August 12th 1997.

Summons to defendant Brozny served, August 15th 1997.

Plaintiff's 90-c statement filed, August 27th 1997.

Agreed order dismissing VBB IV, Inc., and Virginia Barrington from suit in exchange for the right, title, and interest in the purchase promissory note of 4 Glendale J's, Inc., an Illinois corporation dissolved on November 1, 1996, and the personal guaranty of Defendant Brozny, September 4, 1997.

Defendant Brozny filed appearance and 12 jurors jury demand, September 4th 1997.

Defendant's motion to strike and dismiss filed, September 11th 1997.

Third amended complaint filed, September 19th 1997.

Defendant's request for transfer to law division ordered, September 26th 1997.

Defendant filed a section 2-619 motion to strike and dismiss, Petitioner's third amended complaint, November 6, 1997

Plaintiff's motion for summary judgement and memorandum in support of motion for summary judgement filed, November 14th 1997.

Defendant's section 2-619 motion to dismiss 3rd amended complaint filed, December 16th 1997.

Plaintiff's response to defendant's response to section 2-619 motion to dismiss third amended complaint filed, February 9th 1998.

Defendant's section 2-619 motion to dismiss 3rd amended complaint granted, April 8th 1998.

Order of April 8th 1998, dismissing case.

Plaintiff's motion to reconsider, May 7th 1998.

Order of July 13th 1998, dismissing the motion to reconsider.

Order of August 18th 1998, dismissing Plaintiff's motion to submit a bystander's report.

Brief and argument of Plaintiff-Appellant, filed November 15th 1998.

Defendant-Appellee's motion to extend time to file appellee's brief, February 1st 1998.

Defendant-Appellee's motion for leave to supplement record on appeal, February 1st 1998.

Defendant-Appellee's brief, filed March 2nd 1998.

Order of Appellate Court, June 30th 1999, affirming the lower court dismissal of the third amended complaint.

Petition for rehearing, filed July 21st 1999.

Order of Appellate Court denying petition for rehearing, August 3rd 1999.

Plaintiff-Appellant's affidavit of intent to petition for leave to appeal, filed August 11th 1999

Plaintiff-Petitioner's petition for leave to appeal, postmarked September 7th 1999.

Notice and acknowledgement of service of Plaintiff-Petitioner's petition for leave to appeal, postmarked September 7th 1999.

Order of Supreme Court of Illinois denying petition for leave to appeal, December 1st 1999.

Petition for Writ of Certiorari mailed January 11th 1999.

Petition for Writ of Certiorari returned by Clerk for reformatting into booklet form, to be refiled within 60 days, January 27, 2000.

Petition for Writ of Certiorari timely filed, March 2000.